

Hon. Ryan Andrews, Chair
Arizona State, Tribal, and Federal Court Forum
Salt River Pima-Maricopa Indian Community Court
10005 E. Osborn Road
Scottsdale, AZ 85256
602-452-3323
dwithey@courts.az.gov

Hon. Randall Howe, Vice-Chair
Arizona State, Tribal, and Federal Court Forum
Court of Appeals, Division 1
1501 W. Washington
Phoenix, AZ 85007
602-452-3323
dwithey@courts.az.gov

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of)	
)	
PETITION TO AMEND RULES)	
OF THE SUPREME COURT OF)	Supreme Court No. R-18_____
ARIZONA: RULES 38 AND 39)	
_____)	

Pursuant to Rule 28 of the Arizona Supreme Court, Hon. Ryan Andrews, Chief Judge, Salt River Pima Maricopa Indian Community and Hon. Randall Howe, Arizona Court of Appeals, Division 1 as, respectively, Chair and Vice-Chair of the Arizona State, Tribal, and Federal Court Forum respectfully petition this Court to amend [Rules 38](#), and [39](#), [Arizona Rules of the Supreme Court](#) as stated in Appendix A.

I. Background, Purpose and Content of the Proposed Rule Amendments.

The federal Indian Child Welfare Act (ICWA), [25 U.S.C. §§ 1901-1963](#), creates a right for tribal governments from any state to participate in Arizona child custody proceedings. However, ICWA does not provide funding to exercise that right. Additionally, as noted in a [pending petition](#) before the Washington Supreme Court on this subject:

Although many tribes receive federal grants for child and family services, those funds cannot be used for legal representation or for legal fees for litigation. See, e.g., [25 U.S.C. § 1931\(a\)\(8\)](#); [25 C.F.R. §§ 89.40-89.41](#). Other federal moneys for social services are similarly restricted and cannot be used to pay for legal services for litigation. [25 U.S.C. §§ 450 to 458ddd-2](#).

An Indian tribe from another state that seeks to exercise its rights under ICWA by intervening and participating in Arizona dependency proceedings whose employed or retained counsel is not licensed in Arizona encounters the high and sometimes prohibitive cost of the standard bar admission fee and additional attorney fees for Arizona associate counsel for each case in order for the tribe's attorney to appear *pro hac vice*. These requirements are a financial burden on the federal law right of tribal governments to intervene and participate in Arizona ICWA proceedings.

In response to a comment filed in the administrative rule-making process for the recently adopted ICWA regulations the Department of Interior recognized:

... it may be difficult for many Tribes to participate in State court proceedings, particularly where those actions take place outside of the Tribe's State. Section 23.133 encourages State courts to permit alternative means of participation in Indian child-custody proceedings in order to minimize burdens on Tribes and other parties. The Department agrees with the practice adopted by the State courts that permit Tribal representatives to present before the court in ICWA proceedings regardless of whether they are attorneys or attorneys licensed in that State. See e.g., [J.P.H. v. Fla. Dep't of Children & Families](#), 39 So.3d 560 (Fla. Dist. Ct. App. 2010) (per curiam); [State v. Jennifer M. \(In re Elias L.\)](#), 767 N.W.2d 98, 104 (Neb. 2009); [In re N.N.E.](#), 752 N.W.2d 1, 12 (Iowa 2008); [State ex rel. Juvenile Dep't of Lane Cty. v. Shuey](#), 850 P.2d 378 (Or. Ct. App. 1993).¹

In the cited cases the appellate courts of four states concluded the state law concerning unauthorized practice of law was preempted due to the superior federal and tribal interests in tribal participation in state court proceedings governed by ICWA. Petitioner seeks only removal of the financial burdens required for attorneys licensed in other states to represent tribes from other states in Arizona ICWA cases.

The proposed amendment to Arizona Supreme Court Rule 39 would eliminate financially burdensome per case admission fee and associate counsel requirements while maintaining all other obligations under that rule designed to

¹ 81 FR 38778-01, 38798-38799, 2016 WL 3228279(F.R.)

ensure the competence and accountability of out-of-state counsel. The requirement to associate with Arizona counsel is an unnecessary expense considering the proposed practice limitation to ICWA cases which are governed primarily by federal law rather than Arizona law. The reasonableness of these proposed changes is evidenced by the adoption of similar exceptions in the *pro hac vice* rules of Michigan and Oregon and the pending petition in the State of Washington.

Due to the large areas of Indian country in Arizona and significant Indian population that includes members of many tribes, some tribes may anticipate the need to make multiple appearances in Arizona courts on an ongoing basis. The need to repeatedly seek *pro hac vice* admission may become a burden on the tribal government's right to participate in ICWA proceedings even if the per case fee and associate counsel requirements are waived as proposed. Additionally, in child welfare matters, time is of the essence.

The proposed amendments to Rule 38 would provide for ongoing special admission of out-of-state attorneys without fees for the sole purpose and in advance of representing tribes in cases subject to the federal ICWA. The out-of-state attorney would be required to take the Arizona law course described in Rule 34(j) and comply with the MCLE requirements of the attorney's home state.

We agree with the State of Washington petitioners in concluding, "...the proposed amendments improve the welfare of Indian children in ICWA custody proceedings by ensuring that tribes can meaningfully participate in ... child custody proceedings related to their children."

II. Pre-Petition Distribution and Comment.

At its January 27, 2017 meeting, on the recommendation of its ICWA Committee, the Arizona State, Tribal, and Federal Court Forum members approved the filing of a rule petition for the purposes stated and reaffirmed this decision at subsequent meetings. We ask that this petition be distributed for comment for consideration in the Court's regular 2018 rules process.

Wherefore petitioners respectfully request that the Supreme Court amend the Rules of the Supreme Court as set forth in Appendix A.

RESPECTFULLY SUBMITTED this 10th day of January, 2018.

By /S/
Hon. Ryan Andrews, Chair
Arizona State, Tribal, and Federal Court Forum
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Court
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APPENDIX A
Rules of the Supreme Court of Arizona
Proposed Rule Changes

Rule 38. Special Exceptions to Standard Examinations and Admission Process

a. – i. [no changes]

j. Authorization to Practice Law for Attorneys Representing Indian Tribes for the Purpose of Indian Child Welfare Cases. An attorney who has been admitted to practice law in any other jurisdiction may be admitted to practice before the superior and appellate courts of this state for the limited purpose of representing a federally recognized Indian tribe in a child custody proceeding as defined by 25 U.S.C. § 1903 pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. as provided in this paragraph.

1. Definitions.

A. "ICWA" stands for the Indian Child Welfare Act, which is a federal law passed in 1978. ICWA was passed in response to the alarmingly high number of Indian children being removed from their homes by both public and private agencies. The intent of Congress under ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902). ICWA sets minimum federal standards that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe.

B. a "federally recognized tribe" is an American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation.

2. Application and Authorization. An attorney who seeks authorization to practice law under this rule shall file with the clerk of the Supreme Court of Arizona an application including:

A. a certificate from the highest court or agency in the state, territory or district in which the applicant is presently licensed to practice law documenting that the applicant has fulfilled the requirements of active bar membership preceding the date of the application, and that the applicant has not been disciplined for professional misconduct by the bar or highest court of the state, territory or district for the past five years, or during the time of the applicant's licensure, whichever is greater;

B. an affidavit asserting an Indian tribe's intent to employ or retain the applicant in order to intervene and participate in an Arizona child custody proceeding as defined by 25 U.S.C. § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq.

C. a sworn statement signed by the applicant that he or she:

i. has read and is familiar with the Rules of the Supreme Court and any applicable statutes of the State of Arizona relative to the conduct of lawyers, and will abide by the provisions thereof;

ii. submits to the jurisdiction of the Court for disciplinary purposes, as defined by the Rules of the Supreme Court;

iii. has not been disciplined by the bar or courts of any jurisdiction within the past five years, or during the time of the applicant's licensure, whichever is greater; and

iv. has successfully completed the course on Arizona law described in Rule 34(j).

The applicant shall send a copy of the application to the State Bar of Arizona, which shall file any objection to such application with the clerk of the Supreme Court within ten (10) days after the date of receipt of such application. An attorney is not allowed to practice law under this rule until the applicant has been authorized to do so by order of the Supreme Court of Arizona. The clerk of the Supreme Court shall send a copy of the order authorizing the practice of law to the State Bar of Arizona.

3. *Mandatory Continuing Legal Education.* An attorney authorized to practice under this paragraph (g) must comply with the Mandatory Continuing Legal Education (MCLE) requirements of the state identified in subsection (2) (A) of this rule.

4. *Expiration of Authorization.* Authorization to practice law under this section shall remain in effect from the date of the order authorizing the applicant to practice law in the State of Arizona until (A) the applicant no longer represents an Indian tribe, as defined by 25 U.S.C. § 1903; participating in Arizona child custody proceedings as defined by 25 U.S.C. § 1903 pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq; (B) the applicant is admitted to the practice of law in Arizona pursuant to Rules of the Supreme Court 33 through 37; or (C) two years from the date of the order authorizing the applicant to practice law under this rule, whichever comes first.

5. *Discipline.* In addition to any appropriate proceedings and discipline that may be imposed by the Court under these rules, the Rule 38(j) attorney shall be subject to the following disciplinary measures:

A. civil contempt imposed by the presiding judge or hearing officer for failure to abide by a tribunal's orders in any matter in which the Rule 38(j) attorney has participated; and

B. withdrawal of the certification hereunder, with or without cause, by either the Supreme Court.

6. *Limitation of Activities.* An attorney authorized to practice under this rule shall not perform any legal services within the State of Arizona except for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq.

Rule 39. Admission Pro Hac Vice

a. – l. [no changes]

m. Exception. An applicant is not required to associate with local counsel pursuant to subsection (b) and (c) of this rule or pay the fees established by subsection (c)(1)(B) and (h) of this rule if the applicant upon submitting the application required by subsection (c) establishes to the satisfaction of the Bar that:

(1) The applicant seeks to appear in an Arizona court for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq.;

(2) The applicant represents a federally recognized Indian tribe as defined by Rule 37 of the Rules of Procedure for Juvenile Court; and

(3) The Indian child's tribe has submitted a pleading to the court seeking to intervene and participate in the state court proceeding and affirming the child's membership or eligibility of membership under tribal law.

The applicant shall perform the duties required to be performed by associate counsel under paragraph (h) of this rule.